ORIGINAL

No. 89-1101

Supreme Court, U.S.
FILED
FEB 5 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

UNITED STATES OF AMERICA,

Petitioner,

v.

RANDALL GENE CUNNINGHAM,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

David K. Allen
621 S.W. Morrison Street
1125 American Bank Building
Portland, OR 97205
(503) 242-0602
Counsel of Record for Respondent

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QUESTION PRESENTED

Respondent accepts Petitioner's Statement of the question presented in this case.

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Respondent Randall Gene Cunningham, through counsel, opposes the grant of a writ of certiorari as sought by the United States in its petition to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

STATEMENT

Respondent accepts as adequate the statement of the case contained in the Government's petition. Pet., 1-5.

REASONS FOR DENYING THE PETITION

I. The decision of the Ninth Circuit is a correct one.

The Circuit Courts of Appeal have reached conflicting conclusions with regard to the issue raised here. This is generally a basis for granting the writ sought, under Rule 10.1(a). But the approach taken by the Ninth Circuit is the correct one, and this court should adopt it in reversing the lower court decision in United States v. Taylor, 864 F.2d 625 (8th Cir., 1989) cert. granted, No. 88-7194. By extension, this Court should deny the relief sought by Petitioner herein.

In Taylor, the Government concedes that the compromise bill which eventually became the statute at issue in these cases, 18 USC Section 924(e), was ". . . drafted hastily at the end of the session" and as a result it omitted to define the term "burglary." Taylor, U.S. Br. at 27.

In the absence of statutory language, the Courts of Appeal have employed four separate and distinct interpretations of the statute, as accurately described in both the Government's brief in Taylor, supra, at 5-8, and in the Government's Petition in this case, Pet. at 5-7.

The Government further concedes that the States have given numerous definitions to the term "burglary" and those definitions are sufficiently at variance with each other that using them as the basis for a predicate definition under Section 924(e) ". . . could produce anomalous results and appears not to be what Congress had in mind." Taylor, U.S. Br. at 29. If this Court

agrees, reversal would appear to be the required result in Taylor, with resulting remand to the Eighth Circuit.

The Government argues that the predecessor Armed Career Criminal Act of 1984 contained a "generic definition of burglary," 18 U.S.C. App. Section 1202(c)(9) (repealed) that "reflects the prevailing modern view of the offense," even though, as noted, the modern statutes used by the States vary widely. Pet. at 7. The Government argues by extension that the predecessor definition carried over into the existing statute, notwithstanding the fact that it was deleted when the statute was amended.[1]

Against this historical background of varying and contradictory results, it seems clear that Congress has failed to define the term "burglary" as it is employed in the Armed Career Criminal Act. Congress may, indeed, have intended to define the term, and the Government invites this Court to speculate as to the precise definition Congress would have given the term had it thought to do so. This Court should, however, reject the

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[1] In its brief in Taylor, the Government discusses pending remedial legislation apparently intended to resolve the issue raised in this case. The pending legislation would define "burglary" as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a federal or state offense." U.S. Br. at 28. This definition resurrects Section 1202. It should be noted that "surreptitious" entry is not an element of the offense of second degree burglary under either the Oregon statute at issue here or the Missouri statute at issue in Taylor. The proposed remedial legislation would, in fact, apparently remove convictions such as Respondent's from the class of potential predicate crimes.

The ultimate question is not what Congress may have intended to do, but rather what it did. In this instance, Congress has failed to provide a uniform definition of "burglary." Where Congress has omitted to define a term, it is axiomatic that the courts should employ the term as it was used at common law. Accordingly, the decision of the Ninth Circuit in this matter was a correct one, and the Government's Petition for a Writ of Certiorari should be denied.

II. If Certiorari is Granted, this Court should allow Respondent to file a brief on the merits.

The Government apparently asserts that the issue raised in Taylor is identical to that raised in this case, and that Taylor is dispositive. Pet. at 8. Respondent disagrees.

Respondent contended below that on its face, the use of the term "burglary" in Section 924(e) appeared to mean "burglary" ". . . however a State chooses to define it." United States v. Portwood, 857 F.2d 1221, 1224 (8th Cir., 1988), cert. den., 109 S.Ct. 2073 (1989). Respondent argued that the statute was overbroad and violated equal protection, and the Government now apparently concedes that such an interpretation leads to anomalous results and is undesirable. Taylor, U.S. Br. at 29. Respondent urged the Court of Appeals to adopt the construction later adopted by the First Circuit in United States v. Patterson, 882 F.2d 595 (1st Cir., 1989). Under the Patterson rule, a "burglary" is a predicate offense if it also comports with the definition of "violent felony" contained in Section 924, but not

otherwise. 882 F.2d at 604. Because the Government concedes that employment of the "state-label" approach leads to anomalous results, the briefing in Taylor does not address the possibility that the "state-label" approach is a correct analysis of the statute, and that accordingly this Court should confront the constitutional questions of overbreadth and equal protection raised by respondent below.[3] If this Court grants the Government's Petition, this Court should order additional briefing as necessary to fully develop this issue.

CONCLUSION

The Government's Petition should be denied; if the Government's Petition is granted, this Court should order further briefing of issues not addressed in Taylor v. United States.

Respectfully submitted,

David K. Allen
Attorney for Respondent

[3] Petitioner in Taylor raises the issue, Br. Pet. at 26ff; the Government concedes that the approach is flawed without extensive discussion. U.S. Br. at 29ff.